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HAWAII CIVIL RIGHTS COMMISSION
STATE OF HAWAII

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| <p>In the Matter of</p> <p>PETITION TO AMEND HAW. ADMIN. R. §§12-46-109(c) and (d) and 12-46- 175(d),</p> <p>HAWAII EMPLOYERS COUNCIL,</p> <p>Petitioner,</p> | <p>HAWAII EMPLOYERS COUNCIL'S PETITION FOR RULE RELIEF AS TO HAW. ADMIN. R. §§12-46-109(c) &(d), AND 12-46-175(d); APPENDICES "A"- "D"</p> |
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HAWAII EMPLOYERS COUNCIL'S PETITION FOR RULE RELIEF
AS TO HAW. ADMIN. R. §§12-46-109(c) &(d), AND 12-46-175(d)

Pursuant to Haw. Rev. Stat. §91-6 and Haw. Admin. R. §12-46-81, the undersigned petitioner, Hawaii Employers Council ("HEC" or "Petitioner") petitions the Hawaii'i Civil Rights Commission ("HCRC") to amend Haw. Admin. R. §12-46-109, which relates to sexual harassment in employment, and Haw. Admin. R. §12-46-175, which relates to employment harassment on the basis of ancestry.

More specifically, Petitioner requests that Haw. Admin. R. §12-46-109(c) and (d), and §12-46-175(d) be amended to comport with the affirmative defense recognized by the United States Supreme Court in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher

v. City of Boca Raton, 524 U.S. 775 (1998), as well as the United States Equal Employment Opportunity Commission's ("EEOC's") current rules governing unlawful harassment by supervisors.

I. Text of Current Rule and Proposed Amendment

A. Proposed Amendment of Rule on Sexual Harassment

Petitioner proposes that Haw. Admin. R. §12-46-109 be amended so as to strike all of subsection (c) and a portion of subsection (d) as follows:

§12-46-109 Sexual harassment. (a) Harassment on the basis of sex is a violation of chapter 378, HRS. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or visual forms of harassment of a sexual nature constitute sexual harassment when:

- (1) Submission to that conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
- (2) Submission to or rejection of that conduct by an individual is used as the basis for employment decisions affecting that individual; or
- (3) That conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) ~~An employer shall be responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden, and regardless of whether the employer or other covered entity knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acted in either a supervisory or agency capacity.~~

(d) With respect to conduct between employees, an employer shall be responsible for acts of sexual harassment in the workplace where the employer or its agents or supervisory employees knows or should have known of the conduct and fails to take immediate and appropriate corrective action. ~~An employee who has been sexually harassed on the job by a co-worker should inform the employer, its agent, or supervisory employee of the harassment; however, an employee's failure to give such notice may not be an affirmative defense.~~

(e) An employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees at the workplace, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the non-employees.

(f) Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

(g) Prevention is the best tool for the elimination of sexual harassment. Employers should affirmatively raise the subject, express strong disapproval, develop appropriate sanctions, inform employees of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2).

B. Proposed Amendment of Rule on Ancestry Harassment

Petitioner proposes that Haw. Admin. R. §12-46-175, relating to harassment on the basis of ancestry, be amended so as to strike subsection (d) as follows:

§12-46-175 Harassment.

(a) Harassment on the basis of ancestry is a violation of chapter 378, HRS.

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's ancestry constitute harassment when this conduct:

(1) Has the purpose or effect of creating an intimidating, hostile, or offensive working environment;

(2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or

(3) Otherwise adversely affects an individual's employment opportunity.

(c) The employer has an affirmative duty to maintain a working environment free of harassment on the basis of ancestry.

~~(d) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of ancestry regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in a supervisory or agency capacity.~~

(e) With respect to conduct between fellow employees, an employer shall be responsible for acts of harassment in the workplace on the basis of ancestry, where the employer, its agent, or supervisory employee, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(f) An employer may be held responsible for acts of non-employees with respect to harassment of employees on the basis of ancestry, where the employer, its agent, or supervisory employee, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees. [Eff 12/31/90]
(Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

II. Facts And Circumstances Giving Rise To Petition

A. Petitioner's Interest And Reasons For Filing Petition

Petitioner HEC is a non-profit organization whose membership consist of Hawaii employers ranging from small employers to large corporations with hundreds of employees. Its mission, *inter alia*, is to assist its members in creating and maintaining stable, peaceful, and harmonious relations between employers and their employees, to promote a better understanding of the problems of industry, and to provide community leadership in solutions to the problems of industry. Among other things, HEC endeavors to aid its membership in complying with labor and employment laws, and provides human resources and labor relations consultation and training to its members.

The current Hawaii administrative rule relating to sexual harassment appropriately recognizes that “[p]revention is the best tool for the elimination of sexual harassment.” Haw. Admin. R. §12-46-109(g). However, the rule contradicts its own advocacy of preventive measures by purporting to make an employer vicariously liable for the conduct of “its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden, and regardless of whether the employer or

other covered entity knew or should have known of their occurrence.” Haw. Admin. R. §12-46-109(c). As currently written, Haw. Admin. R. §12-46-109(c) inappropriately holds an employer vicariously liable for sexual harassment by its supervisors and “agents,” regardless of whether the employer has taken reasonable steps to prevent and correct sexually harassing behavior, and regardless of whether a complaining employee has unreasonably failed to utilize preventive or corrective opportunities offered by the employer. See Gonsalves v. Nissan Motor Corp., 100 Haw. 149, 181, 58 P.3d 1196, 1228 (2002) (referring to HCRC amicus brief stating that “absolute liability” is imposed for supervisor harassment). Similarly, Haw. Admin. R. §12-46-175(d) inappropriately holds employers strictly liable for ancestry harassment by supervisors and “agents.”

The current Hawai’i administrative rule on sexual harassment also provides that a complaining employee’s failure to notify or complain to his/her employer of sexual harassment “may not be an affirmative defense.” Haw. Admin. R. §12-46-109(d). This rule prevents employers from raising the defense of “avoidable consequences,” recognized under general tort law principles. Gibo v. Honolulu, 51 Haw. 299, 302-303, 459 P.2d 198, 200-201 (Haw. 1969) (discussing “avoidable consequences” doctrine); see also Burlington Industries Inc. v. Ellerth, 524 U.S. 742, 764 (1998). The rule also serves as a disincentive to the timely reporting of harassment complaints. No limitation or exclusion from the defense of avoidable consequences can be inferred from the statutory prohibition on discrimination in Haw. Rev. Stat. §378-2. Rule 12-46-109(d) improperly holds employers liable for harassment which could have been prevented if reasonable notice of harassment is given by employees.

Current rule 12-46-109 is based on former EEOC rule 29 CFR §1604.11(c). Prior to its amendment in 1999, the EEOC rule on sexual harassment by supervisors provided as follows:

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

See former 29 CFR §1604.11 (1998), attached as Appendix "A." The above superceded regulation is virtually identical to current Haw. Admin. R. §12-46-109(c). Similarly, the prior EEOC rule governing harassment on the basis of national origin, 29 CFR §1606.8(c), is virtually identical to current Haw. Admin. R. §12-46-175(d), which regulates harassment on the basis of ancestry. See former 29 CFR §1606.89(c) (1998), attached as Appendix "B."

The EEOC amended its rules governing sexual and national origin harassment in 1999 in order to eliminate the aforementioned provisions imposing strict liability for harassment by supervisors. Rules 29 CFR §1604.11(c) and 29 CFR §1606.8(c) were deleted by the EEOC after the United States Supreme Court's decisions in the companion cases of Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). See 64 Fed. Reg. 58334 (Oct. 29, 1999), attached as Appendix "C." The Court in Ellerth and Faragher reviewed the scope of employer liability for sexual harassment by supervisors under Title VII of the Civil Rights Act of 1964, and recognized an affirmative defense in cases which do not involve "tangible employment actions."

The Court concluded that in sexual harassment cases, an employer may avoid liability for harassment by supervisors where the harassment does not consist of a "tangible employment action." Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807. A "tangible employment action" is one which "constitutes a significant change in employment status, such as hiring, firing, failing to

promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Ellerth, 524 U.S. at 761; *see also*, *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>, attached as Appendix “D.” The Court properly reasoned that employers should only be held strictly liable for unlawful harassment which culminates in a “tangible employment action,” because such acts can only be performed by supervisors, and the supervisor is aided in committing such harassment by virtue of his/her agency relationship with the employer. Ellerth, 524 U.S. at 761-762 (“[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation”).

However, where supervisor harassment does not result in a tangible employment action, the Court held that an employer may raise an affirmative defense to liability, consisting of proof “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807. The Court noted that this affirmative defense comports with Title VII’s emphasis on conciliation, rather than litigation. Ellerth, 524 U.S. at 764; *see also* Pennsylvania State Police v. Suders, 542 U.S. 129, 145 (2004). In addition, the affirmative defense promotes the deterrent objective of Title VII, because the statute’s “‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.” Faragher, 524 U.S. at 806; Ellerth, 524 U.S. at 764 (affirmative defense, by encouraging employees to report harassment, serves a deterrent purpose). Finally, the Court noted that the affirmative defense reflects a fundamental principle of law, the “avoidable

consequences" doctrine, which holds that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages that result" from unlawful conduct. Faragher, 524 U.S. at 806; Ellerth, 524 U.S. at 764.

As a result of the Faragher and Ellerth decisions, on October 29, 1999, the EEOC amended its regulations regarding supervisory harassment based upon sex and national origin. Appendix "C." The EEOC recognized that in light of the affirmative defense recognized in Faragher and Ellerth, the regulations which imposed liability on employers for supervisory harassment regardless of whether the employer took steps to prevent or prohibit harassment, and regardless of whether the employer had notice of the harassment, were no longer valid. *Id.*

Recognition of the affirmative defense described in Faragher and Ellerth would be appropriate under current Hawaii discrimination law. Like Title VII, Hawaii discrimination law requires administrative exhaustion of discrimination claims, and promotes the conciliation of discrimination complaints. *See* H.R.S. §368-13. Providing an affirmative defense where employers provide reasonable complaint procedures and take action to prevent and correct harassment furthers this conciliatory purpose.

Moreover, Hawaii law prohibiting sexual harassment in employment has a deterrent, as well as a remedial, purpose. Subsection (g) of current Haw. Admin. R. §12-46-109 provides:

(g) Prevention is the best tool for the elimination of sexual harassment. Employers should affirmatively raise the subject, express strong disapproval, develop appropriate sanctions, inform employees of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring.

Amending Rule 12-46-109 to conform to federal law under Title VII will encourage employers to adopt and disseminate policies which prohibit unlawful harassment in the workplace and to provide for reasonable complaint procedures. Employers will also be encouraged to establish

mechanisms to investigate and remedy complaints of harassment, and to provide anti-harassment training to supervisors. The proposed amendment also effectuates the doctrine of “avoidable consequences” recognized by Hawaii courts. See Gibo, *supra*, 51 Haw. at 302-303, 459 P.2d at 200-201; Montalvo v. Lapez, 77 Haw. 282, 287, 884 P.2d 345, 350 (1994).

Current rules §12-46-109(c) and §12-46-175(d) hold employers vicariously liable for harassment by “supervisors and agents” regardless of whether employers exercise reasonable care to prevent and correct harassment, and regardless of whether employees unreasonably fail to complain of harassment to their employers. Likewise, although current Haw. Admin. R. §12-46-109(d) encourages employees to report harassment, it states that “an employee's failure to give such notice may not be an affirmative defense.” Because the cited subsections prevent employers from raising the affirmative defense recognized by the U.S. Supreme Court in Ellerth and Faragher, conflict with the doctrine of avoidable consequences recognized under Hawai'i law, and ignore the conciliatory and deterrent purposes of Haw. Rev. Stat. Chapter 378, the referenced subsections (as well as similar language in Haw. Admin. R. §12-46-175(d)) should be stricken from the administrative rules.

Nothing in the language of Haw. Rev. Stat. Chapter 378 suggests that the Hawai'i legislature intended that employers be held strictly liable for all harassment by supervisors. Rather, the cited language in administrative rules 12-46-109(c) and 12-46-175(d) was simply copied from EEOC regulations which have since been superceded. The HCRC regulations on supervisor liability were copied from the EEOC guidelines because the HCRC obviously assumed that an employer's vicarious liability for supervisor harassment under Hawai'i law was the same as an employer's vicarious liability for supervisor harassment under Title VII. If the HCRC's assumption is correct, and the scope of vicarious liability under Hawai'i law is

coextensive with Title VII, then the Hawai'i regulations addressing supervisor liability for harassment should be amended to track the current EEOC regulations, rather than the prior regulations which the EEOC has recognized as defective. Hawai'i has traditionally looked for guidance to federal law under Title VII when interpreting Hawai'i discrimination law. *See Shoppe v. Gucci America, Inc.*, 94 Haw. 368, 377, 14 P.3d 1049, 1058 (2000); *Sam Teague, Ltd. v. Hawai'i Civil Rights Comm'n*, 89 Haw. 269, 279 n. 10, 971 P.2d 1104, 1114 n. 10 (1999).

In considering whether to make the requested amendments, the Commission should recognize that the majority of state courts considering the issue have adopted the *Faragher/Ellerth* affirmative defense. *See Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 NW2d 733 (Iowa 2003); *Bank One v. Murphy*, 52 S.W.3d 540 (Ky. 2001); *Tanner v. Reynolds Metals Co.*, 739 So.2d 893 (La. App. 1999); *Ocana v. American Furniture Co.*, 135 N.M. 539, 91 P.3d 58 (N.M. 2004); *Peterson v. Buckeye Steel Casings*, 133 Ohio App. 3d 715, 729 N.E.2d 813 (Ohio App. 1999); *Parker v. Warren County Utility Dist.*, 2 S.W.3d 170 (Tenn. 1999); *Bartkowiak v. Quantum Chem. Corp.*, 35 S.W.2d 103 (Tex. App. 2000); *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 991 P.2d 674 (Wash. App. 2000). Courts in the aforementioned cases have recognized that the affirmative defense properly encourages both employers and employees to practice reasonable avoidance strategies. Employees may avoid harm by promptly reporting harassment to their employer, while employers may avoid liability by taking reasonable measures to prevent and promptly correct harassment in the workplace.

B. Necessity For Relief

The requested amendment is necessary to further the deterrent purpose of Hawaii's discrimination laws, to prevent employees from obtaining windfall relief in cases where they could have taken reasonable steps to avoid unlawful harassment, and to encourage employers to

promulgate effective harassment policies and to provide training that combats unlawful harassment in the workplace. The requested amendment will also eliminate the contradictory positions taken by different parts of Haw. Admin. R. §12-46-109, at subsection (c) and (d), on the one hand, and subsection (g), on the other hand.

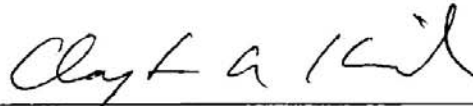
C. Anticipated Effect of Relief

The anticipated effect of the requested relief will be to encourage deterrence of unlawful harassment, while continuing to provide adequate relief for harassment by supervisory employees.

D. Questions and Issues Raised by Petition

Petitioner does not anticipate any significant objections to the requested amendment. However, in the event such objections are raised, Petitioner requests that it be granted leave to respond to such objections.

DATED: Honolulu, Hawai'i, March 20, 2006



CLAYTON A. KAMIDA
GENERAL COUNSEL
HAWAII EMPLOYERS COUNCIL

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TITLE 29 -- LABOR
REVISED AS OF JULY 1, 1998
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1604 -- GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

29 CFR 1604.11

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of section 703 of title VII. n1 Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

n1 The principles involved here continue to apply to race, color, religion or national origin.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

HISTORY: [45 FR 74677, Nov. 10, 1980]

AUTHORITY: (Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et seq.))

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.

Social Security Administration: See Employees' Benefits, 20 CFR chapter III.

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

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TITLE 29 -- LABOR
REVISED AS OF JULY 1, 1998
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1606 -- GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

29 CFR 1606.8

§ 1606.8 Harassment.

(a) The Commission has consistently held that harassment on the basis of national origin is a violation of title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin.
n8

n8 See CD CL68-12-431 EU (1969), CCH EEOC Decisions 6085, 2 FEP Cases 295; CD 72-0621 (1971), CCH EEOC Decisions 6311, 4 FEP Cases 312; CD 72-1561 (1972), CCH EEOC Decisions 6354, 4 FEP Cases 852; CD 74-05 (1973), CCH EEOC Decisions 6387, 6 FEP Cases 834; CD 76-41 (1975), CCH EEOC Decisions 6632. See also, Amendment to Guidelines on Discrimination Because of Sex, § 1604.11(a) n. 1, 45 FR 7476 sy 74677 (November 10, 1980).

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

(c) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of national origin regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

HISTORY: 45 FR 85635, Dec. 29, 1980.

AUTHORITY: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.

Social Security Administration: See Employees' Benefits, 20 CFR chapter III.

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action is needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-ASW-26." The postcard will be date stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various level of government. Therefore, in accordance with Executive order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Further, the FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. Since this rule involves routine matters that will only affect air traffic procedures and air navigation, it does not warrant preparation of a Regulatory Flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9G, *Airspace Designations and Reporting Points*, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005: Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth

* * * * *

ASW TX E5 El Paso, TX [Revised]

El Paso, Biggs AAF, TX
(Lat. 31°50'58" N., long. 106°22'48" W.)
El Paso International Airport, TX
(Lat. 31°48'24" N., long. 106°22'40" W.)
El Paso VORTAC, TX
(Lat. 31°48'57" N., long. 106°16'55" W.)
El Paso, West Texas Airport, TX
(Lat. 31°43'11" N., long. 106°14'21" W.)

That airspace extending upward from 700 feet above the surface within a 9.1-mile radius of Biggs AAF and within a 8.4-mile radius of El Paso International Airport and within 2 miles each side of the 050° bearing from the airport extending from the 8.4-mile radius to 13 miles northeast of the airport and within 1.6 miles each side of the 093° radial of the El Paso VORTAC extending from the 8.4-mile radius to 7.3 miles east of the VORTAC and within a 6.6-mile radius of the West Texas Airport.

* * * * *

Issued in Fort Worth, TX, on October 12, 1999.

Robert N. Stevens,
Acting Manager, Air Traffic Division,
Southwest Region.
[FR Doc. 99-27504 Filed 10-28-99; 8:45 am]
BILLING CODE 4910-13-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Parts 1604 and 1606

Sex Discrimination Guidelines and National Origin Discrimination Guidelines

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: This rule rescinds those paragraphs of the Equal Employment Opportunity Commission's (EEOC's) Sex Discrimination Guidelines and National Origin Discrimination Guidelines that set a standard for employer liability for harassment by supervisors. This action is necessary as a result of recent Supreme Court rulings.

EFFECTIVE DATE: October 29, 1999.

FOR FURTHER INFORMATION CONTACT:

Dianna Johnston, Assistant Legal Counsel, Title VII/ADEA/EPA Division, Office of Legal Counsel, or Elaine Herskowitz, Senior Attorney/Advisor, Title VII/ADEA/EPA Division, Office of Legal Counsel. They can be reached at 202-663-4679. This final rule is also available in the following formats: large print, braille, electronic file on computer disk, and audio-tape. Copies may be obtained from the EEOC's Publication Center by calling 1-800-669-3362 (voice) or 1-800-669-6820 (TDD).

SUPPLEMENTARY INFORMATION: The EEOC is rescinding those subsections of the Sex Discrimination Guidelines, found in 29 CFR 1604.11(c), and the National Origin Discrimination Guidelines, found in 29 CFR 1606.8(c), that address employer liability for harassment by supervisors. The standard set forth in those subsections is no longer valid in light of the Supreme Court's rulings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The Commission has issued detailed guidance interpreting those decisions and explaining the circumstances under which employers are vicariously liable for unlawful harassment by supervisors. See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99), EEOC Compliance Manual (BNA), N:4075 [Binder 3]; also available through EEOC's web site, at www.eeoc.gov, or by calling the EEOC Publications Distribution Center, at 1-800-669-3362 (voice), 1-800-800-3302 (TTY).

Regulatory Procedures**Regulatory Flexibility Act**

In accordance with the Regulatory Flexibility Act (Public Law 96-354, as amended by Public Law 104-121), the Commission has reviewed this regulation, and by approving it, certifies under 5 U.S.C. 605(b) that this regulation will not have a significant economic impact on a substantial number of small entities.

Executive Order 12866

This rule is not a significant regulatory action as defined in Executive Order 12866 and is therefore not subject to review by the Office of Management and Budget.

List of Subjects**29 CFR Part 1604**

Advertising, Employee benefit plans, Equal employment opportunity, Sex discrimination.

29 CFR Part 1606

Equal employment opportunity.

For the Commission,

Ida L. Castro,

Chairwoman.

PART 1604—[AMENDED]

1. The authority citation for part 1604 continues to read as follows:

Authority: Sec. 713(b), 78 Stat. 265, 42 U.S.C. 2000e-12.

2. Section 1604.11 is amended by removing and reserving paragraph (c).

3. Section 1604.11 is amended by adding Appendix A at the end of the section to read as follows:

§ 1604.11 Sexual harassment.

* * * * *

Appendix A to § 1604.11—Background Information

The Commission has rescinded § 1604.11(c) of the Guidelines on Sexual Harassment, which set forth the standard of employer liability for harassment by supervisors. That section is no longer valid, in light of the Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S.

742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The Commission has issued a policy document that examines the Faragher and Ellerth decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99), EEOC Compliance Manual (BNA), N:4075 [Binder 3]; also available through EEOC's web site, at www.eeoc.gov, or by calling the EEOC Publications Distribution Center, at 1-800-669-3362 (voice), 1-800-800-3302 (TTY).

PART 1606—[AMENDED]

4. The authority citation for part 1606 continues to read as follows:

Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

5. Section 1606.8 is amended by removing and reserving paragraph (c).

6. Section 1606.8 is amended by adding Appendix A at the end of the section to read as follows:

§ 1606.8 Harassment.

* * * * *

Appendix A to § 1606.8—Background Information

The Commission has rescinded § 1606.8(c) of the Guidelines on National Origin Harassment, which set forth the standard of employer liability for harassment by supervisors. That section is no longer valid, in light of the Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The Commission has issued a policy document that examines the Faragher and Ellerth decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99), EEOC Compliance Manual (BNA), N:4075 [Binder 3]; also available through EEOC's web site, at www.eeoc.gov, or by calling the EEOC Publications Distribution Center, at 1-800-669-3362 (voice), 1-800-800-3302 (TTY).

[FR Doc. 99-28291 Filed 10-28-99; 8:45 am]

BILLING CODE 6570-01-P

DEPARTMENT OF LABOR**Mine Safety and Health Administration****30 CFR Parts 46 and 48****RIN 1219-AB17****Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines; Correction**

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Final rule; correction.

SUMMARY: This document corrects errors in the final rule for training and retraining of miners that appeared in the *Federal Register* on September 30, 1999.

EFFECTIVE DATE: October 2, 2000.

FOR FURTHER INFORMATION CONTACT:

Carol J. Jones, Acting Director, Office of Standards, Regulations, and Variances, MSHA, (703) 235-1910.

SUPPLEMENTARY INFORMATION: On September 30, 1999, in FR Doc. 99-25273 (64 FR 53080), MSHA published a final rule amending existing health and safety training regulations by establishing new training requirements for shell dredging, sand, gravel, surface stone, surface clay, colloidal phosphate, and surface limestone mines. This document corrects errors in the preamble.

1. On page 53080, in the third column, in the second full paragraph the last three sentences from the end should read "Based on Table 2, MSHA estimates that mine operators will incur a total of 253,393 burden hours at a cost of about \$8.2 million in the first year, and in every other succeeding year (i.e., 3, 5, 7, 9). MSHA estimates the mine operators will incur 240,575 burden hours at a cost of \$7.8 million in years 2, 4, 6, 8, etc. The first year burden hours and costs are composed by summing the figures in Tables 1, 2, 3, and 4."

2. On page 53081, Table 2 should read:

Table 2—Mine Operators' Annual Burden Hours and Costs

| Prov. | Mines (1-5) | | Mines (6-19) | | Mines (≥20) | | Totals | |
|------------|-------------|-----------|--------------|---------|-------------|---------|--------|-----------|
| | Hrs. | Costs | Hrs. | Costs | Hrs. | Costs | Hrs. | Costs |
| 46.3 | 254,584 | \$8,614 | 166,180 | \$5,620 | 124,032 | \$4,321 | 545 | \$18,554 |
| 46.5 | 41,153 | 1,481,519 | 21,604 | 777,757 | 4,963 | 178,654 | 67,720 | 2,437,930 |
| 46.6 | 8,534 | 307,213 | 4,641 | 167,066 | 1,092 | 39,327 | 14,267 | 513,606 |
| 46.7 | 6,102 | 219,673 | 13,328 | 479,804 | 18,692 | 672,924 | 38,122 | 1,372,401 |
| 46.8 | 34,944 | 1,257,994 | 15,538 | 559,369 | 5,552 | 199,882 | 56,035 | 2,017,246 |
| 46.9 | 1,541 | 40,829 | 3,145 | 83,345 | 2,995 | 79,357 | 7,680 | 203,531 |

The U.S. Equal Employment Opportunity Commission

| | | |
|-------------|---------------|---------------|
| | | Number |
| EEOC | NOTICE | 915.002 |
| | | Date |
| | | 6/18/99 |

1. **SUBJECT:** Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors
2. **PURPOSE:** This document provides guidance regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity.
3. **EFFECTIVE DATE:** Upon receipt.
4. **EXPIRATION DATE:** As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.
5. **ORIGINATOR:** Title VII/EPA/ADEA Division, Office of Legal Counsel.
6. **INSTRUCTIONS:** File after Section 615 of Volume II of the Compliance Manual.

6/18/99
Date

/s/
Ida L. Castro
Chairwoman

Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors

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Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

I. Introduction

In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While the *Faragher* and *Ellerth* decisions addressed sexual harassment, the Court's analysis drew upon standards set forth in cases involving harassment on other protected bases. Moreover, the Commission has always taken the position that the same basic standards apply to all types of prohibited harassment.¹ Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment. (See section II, below.)

Harassment remains a pervasive problem in American workplaces. The number of harassment charges filed with the EEOC and state fair employment practices agencies has risen significantly in recent years. For example, the number of sexual harassment charges has increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998. The number of racial harassment charges rose from 4,910 to 9,908 charges in the same time period.

While the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations. The Supreme Court, in *Faragher* and *Ellerth*, relied on Commission guidance which has long advised employers to take all necessary steps to prevent harassment.² The new affirmative defense gives credit for such preventive efforts by an employer, thereby "implement[ing] clear statutory policy and complement[ing] the Government's Title VII enforcement efforts."³

The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes. Furthermore, the anti-discrimination statutes are not a "general civility code."⁴ Thus federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not "extremely serious."⁵ Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment."⁶ The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment.⁷ Existing Commission guidance on the standards for determining whether challenged conduct rises to the level of unlawful harassment remains in effect.

This document supersedes previous Commission guidance on the issue of vicarious liability for harassment by supervisors.⁸ The Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect - an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.⁹ The standard is the same in the case of non-employees, but the employer's control over such individuals' misconduct is considered.¹⁰

II. The Vicarious Liability Rule Applies to Unlawful Harassment on All Covered Bases

The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature¹¹), religion, national origin, protected activity,¹² age, or disability.¹³ Thus, employers should establish anti-harassment policies and complaint procedures covering *all* forms of unlawful harassment.¹⁴

III. Who Qualifies as a Supervisor?

A. Harasser in Supervisory Chain of Command

An employer is subject to vicarious liability for unlawful harassment if the harassment was committed by "a supervisor with immediate (or successively higher) authority over the employee."¹⁵ Thus, it is critical to determine whether the person who engaged in unlawful harassment had supervisory authority over the complainant.

The federal employment discrimination statutes do not contain or define the term "supervisor."¹⁶ The statutes make employers liable for the discriminatory acts of their "agents,"¹⁷ and supervisors are agents of their employers. However, agency principles "may not be transferable in all their particulars" to the federal employment discrimination statutes.¹⁸ The determination of whether an individual has sufficient authority to qualify as a "supervisor" for purposes of vicarious liability cannot be resolved by a purely mechanical application of agency law.¹⁹ Rather, the purposes of the anti-discrimination statutes and the reasoning of the Supreme Court decisions on harassment must be considered.

The Supreme Court, in *Faragher* and *Ellerth*, reasoned that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them.²⁰ Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. The determination as to whether a harasser had such authority is based on his or her job function rather than job title (e.g., "team leader") and must be based on the specific facts.

An individual qualifies as an employee's "supervisor" if:

- a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*
- b. the individual has authority to direct the employee's daily work activities.

1. Authority to Undertake or Recommend Tangible Employment Actions

An individual qualifies as an employee's "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee. "Tangible employment decisions" are decisions that significantly change another employee's employment status. (For a detailed explanation of what constitutes a tangible employment action, see subsection IV(B), below.) Such actions include, but are not limited to, hiring, firing, promoting, demoting, and reassigning the employee. As the Supreme Court stated, "[t]angible employment actions fall within the special province of the supervisor."²¹

An individual whose job responsibilities include the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have the final say. As the Supreme Court recognized in *Ellerth*, a tangible employment decision "may be subject to review by higher level supervisors."²² As long as the individual's recommendation is given substantial weight by the final decisionmaker(s), that individual meets the definition of supervisor.

2. Authority to Direct Employee's Daily Work Activities

An individual who is authorized to direct another employee's day-to-day work activities qualifies as his or her supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate

to consider such a person a "supervisor" when determining whether the employer is vicariously liable.

In *Faragher*, one of the harassers was authorized to hire, supervise, counsel, and discipline lifeguards, while the other harasser was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training.²³ There was no question that the Court viewed them *both* as "supervisors," even though one of them apparently lacked authority regarding tangible job decisions.²⁴

An individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her "supervisor" during that time period. Accordingly, the employer would be subject to vicarious liability if that individual commits unlawful harassment of a subordinate while serving as his or her supervisor.

On the other hand, someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority. Furthermore, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

B. Harasser Outside Supervisory Chain of Command

In some circumstances, an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power.²⁵ The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such authority, then the standard of liability for co-worker harassment applies.

IV. Harassment by Supervisor That Results in a Tangible Employment Action

A. Standard of Liability

An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases.²⁶ The Supreme Court recognized that this result is appropriate because an employer acts through its supervisors, and a supervisor's undertaking of a tangible employment action constitutes an act of the employer.²⁷

B. Definition of "Tangible Employment Action"

A tangible employment action is "a significant change in employment status."²⁸ Unfulfilled threats are insufficient. Characteristics of a tangible employment action are:²⁹

1. A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:

- o it requires an official act of the enterprise;
 - o it usually is documented in official company records;
 - o it may be subject to review by higher level supervisors; and
 - o it often requires the formal approval of the enterprise and use of its internal processes.
2. A tangible employment action usually inflicts direct economic harm.
 3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

Examples of tangible employment actions include:³⁰

- hiring and firing;
- promotion and failure to promote;
- demotion;³¹
- undesirable reassignment;
- a decision causing a significant change in benefits;
- compensation decisions; and
- work assignment.

Any employment action qualifies as "tangible" if it results in a significant change in employment status. For example, significantly changing an individual's duties in his or her existing job constitutes a tangible employment action regardless of whether the individual retains the same salary and benefits.³² Similarly, altering an individual's duties in a way that blocks his or her opportunity for promotion or salary increases also constitutes a tangible employment action.³³

On the other hand, an employment action does not reach the threshold of "tangible" if it results in only an insignificant change in the complainant's employment status. For example, altering an individual's job title does not qualify as a tangible employment action if there is no change in salary, benefits, duties, or prestige, and the only effect is a bruised ego.³⁴ However, if there is a significant change in the status of the position because the new title is less prestigious and thereby effectively constitutes a demotion, a tangible employment action would be found.³⁵

If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit.³⁶ Such harassment previously would have been characterized as "quid pro quo." It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands. The Commission rejects such an analysis. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis. The Supreme Court stated that there must be a significant *change* in employment status; it did not require that the change be adverse in order to qualify as tangible.³⁷

If a challenged employment action is not "tangible," it may still be considered, along with other evidence, as part of a hostile environment claim that is subject to the affirmative defense. In *Ellerth*, the Court concluded that there was no tangible employment action because the supervisor never carried out his threats of job harm. Ellerth could still proceed with her claim of harassment, but the claim was properly "categorized as a hostile work environment claim which requires a showing of

severe or pervasive conduct." 118 S. Ct. at 2265.

C. Link Between Harassment and Tangible Employment Action

When harassment culminates in a tangible employment action, the employer cannot raise the affirmative defense. This sort of claim is analyzed like any other case in which a challenged employment action is alleged to be discriminatory. If the employer produces evidence of a non-discriminatory explanation for the tangible employment action, a determination must be made whether that explanation is a pretext designed to hide a discriminatory motive.

For example, if an employee alleged that she was demoted because she refused her supervisor's sexual advances, a determination would have to be made whether the demotion was *because* of her response to the advances, and hence because of her sex. Similarly, if an employee alleges that he was discharged after being subjected to severe or pervasive harassment by his supervisor based on his national origin, a determination would have to be made whether the discharge was *because* of the employee's national origin.

A strong inference of discrimination will arise whenever a harassing supervisor undertakes or has significant input into a tangible employment action affecting the victim,³⁸ because it can be "assume[d] that the harasser . . . could not act as an objective, non-discriminatory decisionmaker with respect to the plaintiff."³⁹ However, if the employer produces evidence of a non-discriminatory reason for the action, the employee will have to prove that the asserted reason was a pretext designed to hide the true discriminatory motive.

If it is determined that the tangible action was based on a discriminatory reason linked to the preceding harassment, relief could be sought for the entire pattern of misconduct culminating in the tangible employment action, and no affirmative defense is available.⁴⁰ However, the harassment preceding the tangible employment action must be severe or pervasive in order to be actionable.⁴¹ If the tangible employment action was based on a non-discriminatory motive, then the employer would have an opportunity to raise the affirmative defense to a claim based on the preceding harassment.⁴²

V. Harassment by Supervisor That Does Not Result in a Tangible Employment Action

A. Standard of Liability

When harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability or damages, which it must prove by a preponderance of the evidence. The defense consists of two necessary elements:

- (a) the employer exercised reasonable care to prevent and correct promptly any harassment; and
- (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

B. Effect of Standard

If an employer can prove that it discharged its duty of reasonable care and that the employee could have avoided all of the harm but unreasonably failed to do so, the employer will avoid all liability for unlawful harassment.⁴³ For example, if an employee was subjected to a pattern of disability-based

harassment that created an unlawful hostile environment, but the employee unreasonably failed to complain to management before she suffered emotional harm and the employer exercised reasonable care to prevent and promptly correct the harassment, then the employer will avoid all liability.

If an employer cannot prove that it discharged its duty of reasonable care *and* that the employee unreasonably failed to avoid the harm, the employer will be liable. For example, if unlawful harassment by a supervisor occurred and the employer failed to exercise reasonable care to prevent it, the employer will be liable even if the employee unreasonably failed to complain to management or even if the employer took prompt and appropriate corrective action when it gained notice.⁴⁴

In most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability. An effective complaint procedure "encourages employees to report harassing conduct before it becomes severe or pervasive,"⁴⁵ and if an employee promptly utilizes that procedure, the employer can usually stop the harassment before actionable harm occurs.⁴⁶

In some circumstances, however, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee. For example, if an employee's supervisor directed frequent, egregious racial epithets at him that caused emotional harm virtually from the outset, and the employee promptly complained, corrective action by the employer could prevent further harm but might not correct the actionable harm that the employee already had suffered.⁴⁷ Alternatively, if an employee complained about harassment before it became severe or pervasive, remedial measures undertaken by the employer might fail to stop the harassment before it reaches an actionable level, even if those measures are reasonably calculated to halt it. In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care *and* that the employee unreasonably failed to avoid the harm. While a notice- based negligence standard would absolve the employer of liability, the standard set forth in *Ellerth* and *Faragher* does not. As the Court explained, vicarious liability sets a "more stringent standard" for the employer than the "minimum standard" of negligence theory.⁴⁸

While this result may seem harsh to a law abiding employer, it is consistent with liability standards under the anti-discrimination statutes which generally make employers responsible for the discriminatory acts of their supervisors.⁴⁹ If, for example, a supervisor rejects a candidate for promotion because of national origin-based bias, the employer will be liable regardless of whether the employee complained to higher management and regardless of whether higher management had any knowledge about the supervisor's motivation.⁵⁰ Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly. The employer will be shielded from liability for harassment by a supervisor only if it proves that it exercised reasonable care in preventing and correcting the harassment *and* that the employee unreasonably failed to avoid all of the harm. If both parties exercise reasonable care, the defense will fail.

In some cases, an employer will be unable to avoid liability completely, but may be able to establish the affirmative defense as a means to limit damages.⁵¹ The defense only limits damages where the employee reasonably could have avoided some but not all of the harm from the harassment. In the example above, in which the supervisor used frequent, egregious racial epithets, an unreasonable delay by the employee in complaining could limit damages but not eliminate liability entirely. This is because a reasonably prompt complaint would have reduced, but not eliminated, the actionable harm.⁵²

C. First Prong of Affirmative Defense: Employer's Duty to Exercise Reasonable Care

The first prong of the affirmative defense requires a showing by the employer that it undertook

reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. The steps described below are not mandatory requirements - - whether or not an employer can prove that it exercised reasonable care depends on the particular factual circumstances and, in some cases, the nature of the employer's workforce. Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms.⁵³

There are no "safe harbors" for employers based on the written content of policies and procedures. Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively.⁵⁴ If, for example, the employer has an adequate policy and complaint procedure and properly responded to an employee's complaint of harassment, but management ignored previous complaints by other employees about the same harasser, then the employer has not exercised reasonable care in preventing the harassment.⁵⁵ Similarly, if the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable care. Alternatively, lack of a formal policy and complaint procedure will not defeat the defense if the employer exercised sufficient care through other means.

1. Policy and Complaint Procedure

It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." *Ellerth*, 118 S. Ct. at 2270. While the Court noted that this "is not necessary in every instance as a matter of law,"⁵⁶ failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.⁵⁷ (See section V(C) (3), below, for discussion of preventive and corrective measures by small businesses.)

An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

The above elements are explained in the following subsections.

a. Prohibition Against Harassment

An employer's policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (*i.e.*, opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by *anyone* in the workplace – supervisors, co-workers, or non-employees.⁵⁸ Management should convey the seriousness of the prohibition. One way to do that is for the mandate to "come from the top," *i.e.*, from upper management.

The policy should encourage employees to report harassment *before* it becomes severe or pervasive. While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. Therefore, to discharge its duty of preventive care, the employer must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law.

b. Protection Against Retaliation

An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.⁵⁹

Management should undertake whatever measures are necessary to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives.

c. Effective Complaint Process

An employer's harassment complaint procedure should be designed to encourage victims to come forward. To that end, it should clearly explain the process and ensure that there are no unreasonable obstacles to complaints. A complaint procedure should not be rigid, since that could defeat the goal of preventing and correcting harassment. When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing.

The complaint procedure should provide accessible points of contact for the initial complaint.⁶⁰ A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser.⁶¹ Moreover, reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials.⁶²

It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints of harassment. For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. Allowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by his or her supervisor may feel that officials within the chain of command will more readily believe the supervisor's version of events.

It also is important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies and to explain that the deadline runs from the last date of unlawful

harassment, not from the date that the complaint to the employer is resolved.⁶³ While a prompt complaint process should make it feasible for an employee to delay deciding whether to file a charge until the complaint to the employer is resolved, he or she is not required to do so.⁶⁴

d. Confidentiality

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis.⁶⁵

A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.⁶⁶ One mechanism to help avoid such conflicts would be for the employer to set up an informational phone line which employees can use to discuss questions or concerns about harassment on an anonymous basis.⁶⁷

e. Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances.⁶⁸ If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

i. Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from

offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

ii. Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?

- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

iii. Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

f. Assurance of Immediate and Appropriate Corrective Action

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.⁶⁹

Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the employer could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate.

To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense.⁷⁰ If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate.⁷¹

Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise).⁷² Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.⁷³

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

Examples of Measures to Stop the Harassment and Ensure that it Does Not Recur:

- oral⁷⁴ or written warning or reprimand;
- transfer or reassignment;
- demotion;
- reduction of wages;
- suspension;
- discharge;
- training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and
- monitoring of harasser to ensure that harassment stops.

Examples of Measures to Correct the Effects of the Harassment:

- restoration of leave taken because of the harassment;
- expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- reinstatement;
- apology by the harasser;
- monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
- correction of any other harm caused by the harassment (e.g., compensation for losses).

2. Other Preventive and Corrective Measures

An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an anti-harassment policy and complaint procedure. As the Supreme Court stated, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." *Faragher*, 118 S. Ct. at 2291.

An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints⁷⁵ and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures.⁷⁶ For example, if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint.⁷⁷

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.

An employer should keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program.⁷⁸ For example, an employer could include such compliance in formal evaluations.

Reasonable preventive measures include screening applicants for supervisory jobs to see if any have a record of engaging in harassment. If so, it may be necessary for the employer to reject a candidate on that basis or to take additional steps to prevent harassment by that individual.

Finally, it is advisable for an employer to keep records of all complaints of harassment. Without such records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern would be relevant to credibility assessments and disciplinary measures.⁷⁹

3. Small Businesses

It may not be necessary for an employer of a small workforce to implement the type of formal complaint process described above. If it puts into place an effective, informal mechanism to prevent and correct harassment, a small employer could still satisfy the first prong of the affirmative defense to a claim of harassment.⁸⁰ As the Court recognized in *Faragher*, an employer of a small workforce might informally exercise sufficient care to prevent harassment.⁸¹

For example, such an employer's failure to disseminate a written policy against harassment on protected bases would not undermine the affirmative defense if it effectively communicated the prohibition and an effective complaint procedure to all employees at staff meetings. An owner of a small business who regularly meets with all of his or her employees might tell them at monthly staff meetings that he or she will not tolerate harassment and that anyone who experiences harassment should bring it "straight to the top."

If a complaint is made, the business, like any other employer, must conduct a prompt, thorough, and impartial investigation and undertake swift and appropriate corrective action where appropriate. The questions set forth in Section V(C)(1)(e)(i), above, can help guide the inquiry and the factors set forth in Section V(C)(1)(e)(ii) should be considered in evaluating the credibility of each of the parties.

D. Second Prong of Affirmative Defense: Employee's Duty to Exercise Reasonable Care

The second prong of the affirmative defense requires a showing by the employer that the aggrieved employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270.

This element of the defense arises from the general theory "that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Faragher*, 118 S. Ct. at 2292, quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982). Thus an employer who exercised reasonable care as described in subsection V(C), above, is not liable for unlawful harassment if the aggrieved employee could have avoided all of the actionable harm. If some but not all of the harm could have been avoided, then an award of damages will be mitigated accordingly.⁸²

A complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages.

Proof that the employee unreasonably failed to use any complaint procedure provided by the employer will normally satisfy the employer's burden.⁸³ However, it is important to emphasize that an employee who failed to complain does not carry a burden of proving the reasonableness of that decision. Rather, the burden lies with the employer to prove that the employee's failure to complain was unreasonable.

1. Failure to Complain

A determination as to whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstances and information available to the employee *at that time*.⁸⁴ An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. Workplaces need not become battlegrounds where every minor, unwelcome remark based on race, sex, or another protected category triggers a complaint and investigation. An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resort to the complaint process.⁸⁵ The employee may directly say to the harasser that s/he wants the misconduct to stop, and then wait to see if that is effective in ending the harassment before complaining to management. If the harassment persists, however, then further delay in complaining might be found unreasonable.

There might be other reasonable explanations for an employee's delay in complaining or entire failure to utilize the employer's complaint process. For example, the employee might have had reason to believe that:⁸⁶

- using the complaint mechanism entailed a risk of retaliation;
- there were obstacles to complaints; and
- the complaint mechanism was not effective.

To establish the second prong of the affirmative defense, the employer must prove that the belief or perception underlying the employee's failure to complain was unreasonable.

a. Risk of Retaliation

An employer cannot establish that an employee unreasonably failed to use its complaint procedure if that employee reasonably feared retaliation. Surveys have shown that employees who are subjected to harassment frequently do not complain to management due to fear of retaliation.⁸⁷ To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment.

b. Obstacles to Complaints

An employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on unnecessary obstacles to complaints. For example, if the process entailed undue expense by the employee,⁸⁸ inaccessible points of contact for making complaints,⁸⁹ or unnecessarily intimidating or burdensome requirements, failure to invoke it on such a basis would be reasonable.

An employee's failure to participate in a mandatory mediation or other alternative dispute resolution

process also does not constitute unreasonable failure to avoid harm. While an employee can be expected to cooperate in the employer's investigation by providing relevant information, an employee can never be required to waive rights, either substantive or procedural, as an element of his or her exercise of reasonable care.⁹⁰ Nor must an employee have to try to resolve the matter with the harasser as an element of exercising due care.

c. Perception That Complaint Process Was Ineffective

An employer cannot establish the second prong of the defense based on the employee's failure to complain if that failure was based on a reasonable belief that the process was ineffective. For example, an employee would have a reasonable basis to believe that the complaint process is ineffective if the procedure required the employee to complain initially to the harassing supervisor. Such a reasonable basis also would be found if he or she was aware of instances in which co-workers' complaints failed to stop harassment. One way to increase employees' confidence in the efficacy of the complaint process would be for the employer to release general information to employees about corrective and disciplinary measures undertaken to stop harassment.⁹¹

2. Other Efforts to Avoid Harm

Generally, an employer can prove the second prong of the affirmative defense if the employee unreasonably failed to utilize its complaint process. However, such proof will not establish the defense if the employee made other efforts to avoid harm.

For example, a prompt complaint by the employee to the EEOC or a state fair employment practices agency while the harassment is ongoing could qualify as such an effort. A union grievance could also qualify as an effort to avoid harm.⁹² Similarly, a staffing firm worker who is harassed at the client's workplace might report the harassment either to the staffing firm or to the client, reasonably expecting that either would act to correct the problem.⁹³ Thus the worker's failure to complain to one of those entities would not bar him or her from subsequently bringing a claim against it.

With these and any other efforts to avoid harm, the timing of the complaint could affect liability or damages. If the employee could have avoided some of the harm by complaining earlier, then damages would be mitigated accordingly.

VI. Harassment by "Alter Ego" of Employer

A. Standard of Liability

An employer is liable for unlawful harassment whenever the harasser is of a sufficiently high rank to fall "within that class . . . who may be treated as the organization's proxy." *Faragher*, 118 S. Ct. at 2284.⁹⁴ In such circumstances, the official's unlawful harassment is imputed automatically to the employer.⁹⁵ Thus the employer cannot raise the affirmative defense, even if the harassment did not result in a tangible employment action.

B. Officials Who Qualify as "Alter Egos" or "Proxies"

The Court, in *Faragher*, cited the following examples of officials whose harassment could be imputed automatically to the employer:

- president⁹⁶

- owner⁹⁷
- partner⁹⁸
- corporate officer

Faragher, 118 S. Ct. at 2284.

VII. Conclusion

The Supreme Court's rulings in *Ellerth* and *Faragher* create an incentive for employers to implement and enforce strong policies prohibiting harassment and effective complaint procedures. The rulings also create an incentive for employees to alert management about harassment before it becomes severe and pervasive. If employers and employees undertake these steps, unlawful harassment can often be prevented, thereby effectuating an important goal of the anti-discrimination statutes.

¹ See, e.g., 29 C.F.R. § 1604.11 n. 1 ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compliance Manual Section 615.11(a) (BNA 615:0025 ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees").

² See 1980 Guidelines at 29 C.F.R. § 1604.11(f) and Policy Guidance on Current Issues of Sexual Harassment, Section E, 8 FEP Manual 405:6699 (Mar. 19, 1990), *quoted in Faragher*, 118 S. Ct. at 2292.

³ *Faragher*, 118 S. Ct. at 2292.

⁴ *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998).

⁵ *Faragher*, 118 S.Ct. at 2283. However, when isolated incidents that are not "extremely serious" come to the attention of management, appropriate corrective action should still be taken so that they do not escalate. See Section V(C)(1)(a), below.

⁶ *Oncale*, 118 S. Ct. at 1003.

⁷ Some previous Commission documents classified harassment as either "quid pro quo" or hostile environment. However, it is now more useful to distinguish between harassment that results in a tangible employment action and harassment that creates a hostile work environment, since that dichotomy determines whether the employer can raise the affirmative defense to vicarious liability. Guidance on the definition of "tangible employment action" appears in section IV(B), below.

⁸ The guidance in this document applies to federal sector employers, as well as all other employers covered by the statutes enforced by the Commission.

⁹ 29 C.F.R. § 1604.11(d).

¹⁰ The Commission will rescind Subsection 1604.11(c) of the 1980 Guidelines on Sexual Harassment, 29 CFR § 1604.11(c). In addition, the following Commission guidance is no longer in effect: Subsection D of the 1990 Policy Statement on Current Issues in Sexual Harassment ("Employer Liability for Harassment by Supervisors"), EEOC Compliance Manual (BNA) N:4050-58 (3/19/90); and EEOC Compliance Manual Section 615.3(c) (BNA) 6:15-0007 - 0008.

The remaining portions of the 1980 Guidelines, the 1990 Policy Statement, and Section 615 of the Compliance Manual remain in effect. Other Commission guidance on harassment also remains in effect, including the Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, EEOC Compliance Manual (BNA) N:4071 (3/8/94) and the Policy Guidance on Employer Liability for Sexual Favoritism, EEOC Compliance Manual (BNA) N:5051 (3/19/90).

¹¹ Harassment that is targeted at an individual because of his or her sex violates Title VII even if it does not involve sexual comments or conduct. Thus, for example, frequent, derogatory remarks about women could constitute unlawful harassment even if the remarks are not sexual in nature. See 1990 Policy Guidance on Current Issues of Sexual Harassment, subsection C(4) ("sex- based harassment - that is, harassment not involving sexual activity or language - may also give rise to Title VII liability . . . if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex").

¹² "Protected activity" means opposition to discrimination or participation in proceedings covered by the anti-discrimination statutes. Harassment based on protected activity can constitute unlawful retaliation. See EEOC Compliance Manual Section 8 ("Retaliation") (BNA) 614:001 (May 20, 1998).

¹³ For cases applying *Ellerth* and *Faragher* to harassment on different bases, see *Hafford v. Seidner*, 167 F.3d 1074, 1080 (6th Cir. 1999) (religion and race); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) (age); *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 411 (6th Cir. 1999) (race); *Richmond-Hopes v. City of Cleveland*, No. 97-3595, 1998 WL 808222 at *9 (6th Cir. Nov. 16, 1998) (unpublished) (retaliation); *Wright- Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race); *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925 at *5 (N.D. Ill. Jan. 7, 1999) (national origin). See also *Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998) (assuming without deciding that ADA hostile environment claims are modeled after Title VII claims), *cert. denied*, 119 S. Ct. 1141 (1999).

¹⁴ The majority's analysis in both *Faragher* and *Ellerth* drew upon the liability standards for harassment on other protected bases. It is therefore clear that the same standards apply. See *Faragher*, 118 S. Ct. at 2283 (in determining appropriate standard of liability for sexual harassment by supervisors, Court "drew upon cases recognizing liability for discriminatory harassment based on race and national origin"); *Ellerth*, 118 S. Ct. at 2268 (Court imported concept of "tangible employment action" in race, age and national origin discrimination cases for resolution of vicarious liability in sexual harassment cases). See also cases cited in n.13, above.

¹⁵ *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

¹⁶ Numerous statutes contain the word "supervisor," and some contain definitions of the term. See, e.g., 12 U.S.C. § 1813(r) (definition of "State bank supervisor" in legislation regarding Federal Deposit Insurance Corporation); 29 U.S.C. § 152(11) (definition of "supervisor" in National Labor Relations Act); 42 U.S.C. § 8262(2) (definition of "facility energy supervisor" in Federal Energy Initiative legislation). The definitions vary depending on the purpose and structure of each statute. The definition of the word "supervisor" under other statutes does not control, and is not affected by, the meaning of that term under the employment discrimination statutes.

¹⁷ See 42 U.S.C. 2000e(a) (Title VII); 29 U.S.C. 630(b) (ADEA); and 42 U.S.C. §12111(5)(A) (ADA) (all defining "employer" as including any agent of the employer).

¹⁸ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Faragher*, 118 S. Ct. at 2290 n.3; *Ellerth*, 118 S. Ct. at 2266.

¹⁹ See *Faragher*, 118 S. Ct. at 2288 (analysis of vicarious liability "calls not for a mechanical application

of indefinite and malleable factors set forth in the Restatement . . . but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment . . . ") and at 2290 n.3 (agency concepts must be adapted to the practical objectives of the anti-discrimination statutes).

²⁰ *Faragher*, 118 S. Ct. at 2290; *Ellerth*, 118 S. Ct. at 2269.

²¹ *Ellerth*, 118 S. Ct. at 2269.

²² *Ellerth*, 118 S. Ct. at 2269.

²³ *Faragher*, 118 S. Ct. at 2280. For a more detailed discussion of the harassers' job responsibilities, see *Faragher*, 864 F. Supp. 1552, 1563 (S.D. Fla. 1994).

²⁴ See *Grozdanich v. Leisure Hills Health Center*, 25 F. Supp.2d 953, 973 (D. Minn. 1998) ("it is evident that the Supreme Court views the term 'supervisor' as more expansive than as merely including those employees whose opinions are dispositive on hiring, firing, and promotion"; thus, "charge nurse" who had authority to control plaintiff's daily activities and recommend discipline qualified as "supervisor" and therefore rendered employer vicariously liable under Title VII for his harassment of plaintiff, subject to affirmative defense).

²⁵ See *Ellerth*, 118 S. Ct. at 2268 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *Llampallas v. Mini-Circuit Lab, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action.").

²⁶ Of course, traditional principles of mitigation of damages apply in these cases, as well as all other employment discrimination cases. See generally *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

²⁷ *Ellerth*, 118 S. Ct. at 2269; *Faragher*, 118 S. Ct. 2284-85. See also *Durham Life Insurance Co., v. Evans*, 166 F.3d 139, 152 (3rd Cir. 1999) ("A supervisor can only take a tangible adverse employment action because of the authority delegated by the employer . . . and thus the employer is properly charged with the consequences of that delegation.").

²⁸ *Ellerth*, 118 S. Ct. at 2268.

²⁹ All listed criteria are set forth in *Ellerth*, 118 S. Ct. at 2269.

³⁰ All listed examples are set forth in *Ellerth* and/or *Faragher*. See *Ellerth*, 118 S. Ct. at 2268 and 2270; *Faragher*, 118 S. Ct. at 2284, 2291, and 2293.

³¹ Other forms of formal discipline would qualify as well, such as suspension. Any disciplinary action undertaken as part of a program of progressive discipline is "tangible" because it brings the employee one step closer to discharge.

³² The Commission disagrees with the Fourth Circuit's conclusion in *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172 (4th Cir. 1998), that the plaintiff was not subjected to a tangible employment action where the harassing supervisor "dramatically increased her workload," *Reinhold*, 947 F. Supp. 919, 923 (E.D. Va. 1996), denied her the opportunity to attend a professional conference, required her

to monitor and discipline a co-worker, and generally gave her undesirable assignments. The Fourth Circuit ruled that the plaintiff had not been subjected to a tangible employment action because she had not "experienced a change in her employment status akin to a demotion or a reassignment entailing significantly different job responsibilities." 151 F.3d at 175. It is the Commission's view that the Fourth Circuit misconstrued *Faragher* and *Ellerth*. While minor changes in work assignments would not rise to the level of tangible job harm, the actions of the supervisor in *Reinhold* were substantial enough to significantly alter the plaintiff's employment status.

³³ See *Durham*, 166 F.3d at 152-53 (assigning insurance salesperson heavy load of inactive policies, which had a severe negative impact on her earnings, and depriving her of her private office and secretary, were tangible employment actions); *Bryson v. Chicago State University*, 96 F.3d 912, 917 (7th Cir. 1996) ("Depriving someone of the building blocks for . . . a promotion . . . is just as serious as depriving her of the job itself.").

³⁴ See *Flaherty v. Gas Research Institute*, 31 F.3d 451, 457 (7th Cir. 1994) (change in reporting relationship requiring plaintiff to report to former subordinate, while maybe bruising plaintiff's ego, did not affect his salary, benefits, and level of responsibility and therefore could not be challenged in ADEA claim), cited in *Ellerth*, 118 S. Ct. at 2269.

³⁵ See *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to the particular situation."), quoted in *Ellerth*, 118 S. Ct. at 2268-69.

³⁶ See *Nichols v. Frank*, 42 F.3d 503, 512-13 (9th Cir. 1994) (employer vicariously liable where its supervisor granted plaintiff's leave requests based on her submission to sexual conduct), cited in *Faragher*, 118 S. Ct. at 2285.

³⁷ See *Ellerth*, 118 S. Ct. at 2268 and *Faragher*, 118 S. Ct. at 2284 (listed examples of tangible employment actions that included both positive and negative job decisions: hiring *and* firing; promotion *and* failure to promote).

³⁸ The link could be established even if the harasser was not the ultimate decision maker. See, e.g., *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (noting that committee rather than the supervisor fired plaintiff, but employer was still liable because committee functioned as supervisor's "cat's paw"), cited in *Ellerth*, 118 S. Ct. at 2269.

³⁹ *Llampallas*, 163 F.3d at 1247.

⁴⁰ *Ellerth*, 118 S. Ct. at 2270 ("[n]o affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action . . ."); *Faragher*, 118 S. Ct. at 2293 (same). See also *Durham*, 166 F.3d at 154 ("When harassment becomes adverse employment action, the employer loses the affirmative defense, even if it might have been available before."); *Lissau v. Southern Food Services, Inc.*, 159 F.3d 177, 184 (4th Cir. 1998) (the affirmative defense "is not available in a hostile work environment case when the supervisor takes a tangible employment action against the employee as part of the harassment") (Michael, J., concurring).

⁴¹ *Ellerth*, 118 S. Ct. at 2265. Even if the preceding acts were not severe or pervasive, they still may be relevant evidence in determining whether the tangible employment action was discriminatory.

⁴² See *Lissau v. Southern Food Service, Inc.*, 159 F.3d at 182 (if plaintiff could not prove that her

discharge resulted from her refusal to submit to her supervisor's sexual harassment, then the defendant could advance the affirmative defense); *Newton v. Caldwell Laboratories*, 156 F.3d 880, 883 (8th Cir. 1998) (plaintiff failed to prove that her rejection of her supervisor's sexual advances was the reason that her request for a transfer was denied and that she was discharged; her claim was therefore categorized as one of hostile environment harassment); *Fierro v. Saks Fifth Avenue*, 13 F. Supp.2d 481, 491 (S.D.N.Y. 1998) (plaintiff claimed that his discharge resulted from national origin harassment but court found that he was discharged because of embezzlement; thus, employer could raise affirmative defense as to the harassment preceding the discharge).

⁴³ See *Faragher*, 118 S. Ct. at 2292 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care.").

⁴⁴ See, e.g., *EEOC v. SBS Transit, Inc.*, No. 97-4164, 1998 WL 903833 at *1 (6th Cir. Dec. 18, 1998) (unpublished) (lower court erred when it reasoned that employer liability for sexual harassment is negated if the employer responds adequately and effectively once it has notice of the supervisor's harassment; that standard conflicts with affirmative defense which requires proof that employer "took reasonable care to prevent and correct promptly any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer").

⁴⁵ *Ellerth*, 118 S. Ct. at 2270.

⁴⁶ See *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 803 (5th Cir. 1999) ("when an employer satisfies the first element of the Supreme Court's affirmative defense, it will likely forestall its own vicarious liability for a supervisor's discriminatory conduct by nipping such behavior in the bud") (Wiener, J., concurring in *Indest*, 164 F.3d 258 (5th Cir. 1999)). The Commission agrees with Judge Wiener's concurrence in *Indest* that the court in that case dismissed the plaintiff's claims on an erroneous basis. The plaintiff alleged that her supervisor made five crude sexual comments or gestures to her during a week-long convention. She reported the incidents to appropriate management officials who investigated the matter and meted out appropriate discipline. No further incidents of harassment occurred. The court noted that it was "difficult to conclude" that the conduct to which the plaintiff was briefly subjected created an unlawful hostile environment. Nevertheless, the court went on to consider liability. It stated that *Ellerth* and *Faragher* do not apply where the plaintiff quickly resorted to the employer's grievance procedure and the employer took prompt remedial action. In such a case, according to the court, the employer's quick response exempts it from liability. The Commission agrees with Judge Wiener that *Ellerth* and *Faragher* do control the analysis in such cases, and that an employee's prompt complaint to management forecloses the employer from proving the affirmative defense. However, as Judge Wiener pointed out, an employer's quick remedial action will often thwart the creation of an unlawful hostile environment, rendering any consideration of employer liability unnecessary.

⁴⁷ See *Greene v. Dalton*, 164 F.3d 671, 674 (D.C. Cir. 1999) (in order for defendant to avoid all liability for sexual harassment leading to rape of plaintiff "it must show not merely that [the plaintiff] inexcusably delayed reporting the alleged rape . . . but that, as a matter of law, a reasonable person in [her] place would have come forward early enough to prevent [the] harassment from becoming 'severe or pervasive'").

⁴⁸ *Ellerth*, 118 S. Ct. at 2267.

⁴⁹ Under this same principle, it is the Commission's position that an employer is liable for punitive damages if its supervisor commits unlawful harassment or other discriminatory conduct with malice or with reckless indifference to the employee's federally protected rights. (The Supreme Court will determine the standard for awarding punitive damages in *Kolstad v. American Dental Association*, 119 S. Ct. 401 (1998) (granting certiorari).) The test for imposition of punitive damages is the mental state

of the harasser, not of higher-level officials. This approach furthers the remedial and deterrent objectives of the anti-discrimination statutes, and is consistent with the vicarious liability standard set forth in *Faragher* and *Ellerth*.

⁵⁰ Even if higher management proves that evidence it discovered after-the-fact would have justified the supervisor's action, such evidence can only limit remedies, not eliminate liability. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-62 (1995).

⁵¹ See *Faragher*, 118 S. Ct. at 2293, and *Ellerth*, 118 S. Ct. at 2270 (affirmative defense operates either to eliminate liability or limit damages).

⁵² See *Faragher*, 118 S. Ct. at 2292 ("if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided").

⁵³ See Section V(C)(3) for a discussion of preventive and corrective care by small employers.

⁵⁴ See *Hurley v. Atlantic City Police Dept.*, No. 96-5634, 96-5633, 96-5661, 96-5738, 1999 WL 150301 (3d Cir. March 18, 1999) ("*Ellerth* and *Faragher* do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort"; defendant failed to prove affirmative defense where it issued written policies without enforcing them, painted over offensive graffiti every few months only to see it go up again in minutes, and failed to investigate sexual harassment as it investigated and punished other forms of misconduct.).

⁵⁵ See *Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 422 (11th Cir. 1999) (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action).

⁵⁶ *Ellerth*, 118 S. Ct. at 2270.

⁵⁷ A union grievance and arbitration system does not fulfill this obligation. Decision making under such a system addresses the collective interests of bargaining unit members, while decision making under an internal harassment complaint process should focus on the individual complainant's rights under the employer's anti-harassment policy.

An arbitration, mediation, or other alternative dispute resolution process also does not fulfill the employer's duty of due care. The employer cannot discharge its responsibility to investigate complaints of harassment and undertake corrective measures by providing employees with a dispute resolution process. For further discussion of the impact of such procedures on the affirmative defense, see Section V(D)(1)(b), below.

Finally, a federal agency's formal, internal EEO complaint process does not, by itself, fulfill its obligation to exercise reasonable care. That process only addresses complaints of violations of the federal EEO laws, while the Court, in *Ellerth*, made clear that an employer should encourage employees "to report harassing conduct before it becomes severe or pervasive." *Ellerth*, 118 S. Ct. at 2270. Furthermore, the EEO process is designed to assess whether the agency is liable for unlawful discrimination and does not necessarily fulfill the agency's obligation to undertake immediate and appropriate corrective action.

⁵⁸ Although the affirmative defense does not apply in cases of harassment by co-workers or non-employees, an employer cannot claim lack of knowledge as a defense to such harassment if it did not make clear to employees that they can bring such misconduct to the attention of management and that such complaints will be addressed. See *Perry v. Ethan Allen*, 115 F.3d 143, 149 (2d Cir. 1997) ("When

harassment is perpetrated by the plaintiff's coworkers, an employer will be liable if the plaintiff demonstrates that "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it"), *cited in Faragher*, 118 S. Ct. at 2289. Furthermore, an employer is liable for harassment by a co-worker or non-employee if management knew or should have known of the misconduct, unless the employer can show that it took immediate and appropriate corrective action. 29 C.F.R. § 1604.11(d). Therefore, the employer should have a mechanism for investigating such allegations and undertaking corrective action, where appropriate.

⁵⁹ Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation. See, e.g., Louise F. Fitzgerald & Suzanne Swan, "Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment," 51 *Journal of Social Issues* 117, 121-22 (1995) (citing studies). Surveys also have shown that a significant proportion of harassment victims are worse off after complaining. *Id.* at 123-24; see also Patricia A. Frazier, "Overview of Sexual Harassment From the Behavioral Science Perspective," paper presented at the American Bar Association National Institute on Sexual Harassment at B-17 (1998) (reviewing studies that show frequency of retaliation after victims confront their harasser or filed formal complaints).

⁶⁰ See *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998) (complaint process deficient where it permitted employees to bypass the harassing supervisor by complaining to director of personnel services, but the director was inaccessible due to hours of duty and location in separate facility).

⁶¹ *Faragher*, 118 S. Ct. at 2293 (in holding as matter of law that City did not exercise reasonable care to prevent the supervisors' harassment, Court took note of fact that City's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints"); *Meritor Savings Bank, FSB v. Vinson*, 471 U.S. 57, 72 (1986).

⁶² See Wilson, 164 F.3d at 541 (complaint procedure deficient because it only required supervisors to report "formal" as opposed to "informal" complaints of harassment); *Varner v. National Super Markets Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert denied*, 519 U.S. 1110 (1997) (complaint procedure is not effective if it does not require supervisor with knowledge of harassment to report the information to those in position to take appropriate action).

⁶³ It is particularly important for federal agencies to explain the statute of limitations for filing formal EEO complaints, because the regulatory deadline is only 45 days and employees may otherwise assume they can wait whatever length of time it takes for management to complete its internal investigation.

⁶⁴ If an employer actively misleads an employee into missing the deadline for filing a charge by dragging out its investigation and assuring the employee that the harassment will be rectified, then the employer would be "equitably estopped" from challenging the delay. See *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) ("an employer's affirmatively misleading statements that a grievance will be resolved in the employee's favor can establish an equitable estoppel"); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992) (tolling is appropriate where plaintiff was led by defendant to believe that the discriminatory treatment would be rectified); *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 845 (3d Cir. 1992) (equitable tolling applies where employer's own acts or omission has lulled the plaintiff into foregoing prompt attempt to vindicate his rights).

⁶⁵ The sharing of records about a harassment complaint with prospective employers of the complainant could constitute unlawful retaliation. See Compliance Manual Section 8 ("Retaliation"), subsection II D (2), (BNA) 614:0005 (5/20/98).

⁶⁶ One court has suggested that it may be permissible to honor such a request, but that when the harassment is severe, an employer cannot just stand by, even if requested to do so. *Torres v. Pisano*, 116 F.3d 625 (2d Cir.), *cert. denied*, 118 S. Ct. 563(1997).

⁶⁷ Employers may hesitate to set up such a phone line due to concern that it may create a duty to investigate anonymous complaints, even if based on mere rumor. To avoid any confusion as to whether an anonymous complaint through such a phone line triggers an investigation, the employer should make clear that the person who takes the calls is not a management official and can only answer questions and provide information. An investigation will proceed only if a complaint is made through the internal complaint process or if management otherwise learns about alleged harassment.

⁶⁸ See, e.g., *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996) (employer's response prompt where it began investigation on the day that complaint was made, conducted interviews within two days, and fired the harasser within ten days); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer's response to complaints inadequate despite eventual discharge of harasser where it did not seriously investigate or strongly reprimand supervisor until after plaintiff filed charge with state FEP agency), *cert. denied*, 513 U.S. 1082 (1995); *Saxton v. AT&T*, 10 F.3d 526, 535 (7th Cir 1993) (investigation prompt where it was begun one day after complaint and a detailed report was completed two weeks later); *Nash v. Electrospace Systems, Inc.* 9 F.3d 401, 404 (5th Cir. 1993) (prompt investigation completed within one week); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 319 (7th Cir. 1992) (adequate investigation completed within four days).

⁶⁹ Management may be reluctant to release information about specific disciplinary measures that it undertakes against the harasser, due to concerns about potential defamation claims by the harasser. However, many courts have recognized that limited disclosures of such information are privileged. For cases addressing defenses to defamation claims arising out of alleged harassment, see *Duffy v. Leading Edge Products*, 44 F.3d 308, 311 (5th Cir. 1995) (qualified privilege applied to statements accusing plaintiff of harassment); *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (qualified privilege protects employer's statements in bulletin to employees concerning dismissal of alleged harasser); *Stockley v. AT&T*, 687 F. Supp. 764 (F. Supp. 764 (E.D.N.Y. 1988) (statements made in course of investigation into sexual harassment charges protected by qualified privilege).

⁷⁰ *Mockler v Multnomah County*, 140 F.3d 808, 813 (9th Cir. 1998).

⁷¹ In some cases, accused harassers who were subjected to discipline and subsequently exonerated have claimed that the disciplinary action was discriminatory. No discrimination will be found if the employer had a good faith belief that such action was warranted and there is no evidence that it undertook less punitive measures against similarly situated employees outside his or her protected class who were accused of harassment. In such circumstances, the Commission will not find pretext based solely on an after-the-fact conclusion that the disciplinary action was inappropriate. See *Waggoner v. City of Garland Tex.*, 987 F.2d 1160, 1165 (5th Cir. 1993) (where accused harasser claims that disciplinary action was discriminatory, "[t]he real issue is whether the employer reasonably believed the employee's allegation [of harassment] and acted on it in good faith, or to the contrary, the employer did not actually believe the co-employee's allegation but instead used it as a pretext for an otherwise discriminatory dismissal").

⁷² See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer remedial action for sexual harassment by supervisor inadequate where it twice changed plaintiff's shift to get her away from supervisor rather than change his shift or work area), *cert. denied*, 513 U.S. 1082 (1995).

⁷³ See *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) ("a remedial measure that makes the victim of

sexual harassment worse off is ineffective *per se*").

⁷⁴ An oral warning or reprimand would be appropriate only if the misconduct was isolated and minor. If an employer relies on oral warnings or reprimands to correct harassment, it will have difficulty proving that it exercised reasonable care to prevent and correct such misconduct.

⁷⁵ See *Varner*, 94 F.3d at 1213 (complaint procedure is not effective if it does not require supervisor with knowledge of harassment to report the information to those in position to take appropriate action), *cert denied*, 117 S. Ct. 946 (1997); accord *Wilson v. Tulsa Junior College*, 164 F.3d at 541.

⁷⁶ See *Wilson*, 164 F.3d at 541 (complaint procedure deficient because it only required supervisors to report "formal" as opposed to "informal" complaints of harassment).

⁷⁷ See, e.g., *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996) (where harassment of plaintiffs was so pervasive that higher management could be deemed to have constructive knowledge of it, employer was obligated to undertake corrective action even though plaintiffs did not register complaints); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp.2d 870, 882 (N.D. Ind. 1998) (employer has constructive knowledge of harassment by supervisors where it "was so broad in scope and so permeated the workplace that it must have come to the attention of someone authorized to do something about it").

⁷⁸ In *Faragher*, the City lost the opportunity to establish the affirmative defense in part because "its officials made no attempt to keep track of the conduct of supervisors." *Faragher*, 118 S. Ct. at 2293.

⁷⁹ See subsections V(C)(1)(e)(ii) and V(C)(2), above.

⁸⁰ If the owner of the business commits unlawful harassment, then the business will automatically be found liable under the alter ego standard and no affirmative defense can be raised. See Section VI, below.

⁸¹ *Faragher*, 118 S. Ct. at 2293.

⁸² *Faragher*, 118 S. Ct. at 2292 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.").

⁸³ *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293. See also *Scrivner v. Socorro Independent School District*, 169 F.3d 969, 971 (5th Cir., 1999) (employer established second prong of defense where harassment began during summer, plaintiff misled investigators inquiring into anonymous complaint by denying that harassment occurred, and plaintiff did not complain about the harassment until the following March).

⁸⁴ The employee is not required to have chosen "the course that events later show to have been the best." Restatement (Second) of Torts § 918, comment c.

⁸⁵ See *Corcoran v. Shoney's Colonial, Inc.*, 24 F. Supp.2d 601, 606 (W.D. Va. 1998) ("Though unwanted sexual remarks have no place in the work environment, it is far from uncommon for those subjected to such remarks to ignore them when they are first made.").

⁸⁶ See *Faragher*, 118 S. Ct. at 2292 (defense established if plaintiff unreasonably failed to avail herself

of "a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense"). See *also* Restatement (Second) of Torts § 918, comment c (tort victim "is not barred from full recovery by the fact that it would have been reasonable for him to make expenditures or subject himself to pain or risk; it is only when he is unreasonable in refusing or failing to take action to prevent further loss that his damages are curtailed").

⁸⁷ See n.59, above.

⁸⁸ See *Faragher*, 118 S. Ct. at 2292 (employee should not recover for harm that could have been avoided by utilizing a proven, effective complaint process that was available "without undue risk or expense").

⁸⁹ See *Wilson*, 164 F.3d at 541 (complaint process deficient where official who could take complaint was inaccessible due to hours of duty and location in separate facility).

⁹⁰ See Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Compliance Manual (BNA) N:3101 (7/10/97).

⁹¹ For a discussion of defamation claims and the application of a qualified privilege to an employer's statements about instances of harassment, see n.69, above.

⁹² See *Watts v. Kroger Company*, 170 F.3d 505, 510 (5th Cir., 1999) (plaintiff made effort "to avoid harm otherwise" where she filed a union grievance and did not utilize the employer's harassment complaint process; both the employer and union procedures were corrective mechanisms designed to avoid harm).

⁹³ Both the staffing firm and the client may be legally responsible, under the anti-discrimination statutes, for undertaking corrective action. See Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Compliance Manual (BNA) N:3317 (12/3/97).

⁹⁴ See *also Ellert*, 118 S. Ct. at 2267 (under agency principles an employer is indirectly liable "where the agent's high rank in the company makes him or her the employer's alter ego"); *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1376 (10th Cir. 1998) ("the Supreme Court in *Burlington* acknowledged an employer can be held vicariously liable under Title VII if the harassing employee's 'high rank in the company makes him or her the employer's alter ego'").

⁹⁵ *Faragher*, 118 S. Ct. at 2284.

⁹⁶ The Court noted that the standards for employer liability were not at issue in the case of *Harris v. Forklift Systems*, 510 U.S. 17 (1993), because the harasser was the president of the company. *Faragher*, 118 S. Ct. at 2284.

⁹⁷ An individual who has an ownership interest in an organization, receives compensation based on its profits, and participates in managing the organization would qualify as an "owner" or "partner." *Serapion v. Martinez*, 119 F.3d 982, 990 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998).

⁹⁸ *Id.*

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